
**APPEALS BOARD
UTAH LABOR COMMISSION**

DENNIS C. OWEN,

Petitioner,

vs.

**NAPA AUTO PARTS and
PHOENIX INSURANCE CO.,**

Respondents.

**ORDER ON MOTION
FOR REVIEW**

ORDER OF REMAND

Case No. 06-0807

Dennis C. Owen asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Marlowe's denial of his claim for benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to §63G-4-301 of the Utah Administrative Procedures Act and §34A-2-801(3) of the Utah Workers' Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Mr. Owen claims workers' compensation benefits for a shoulder injury he suffered on July 8, 2006, while working for NAPA Auto Parts ("NAPA"). Judge Marlowe held an evidentiary hearing on the claim, but did not appoint a medical panel. Judge Marlowe determined from the evidence that Mr. Owen suffered from a preexisting condition that contributed to his injury.

Based on Mr. Owen's preexisting condition, Judge Marlowe found that his injury was not compensable because it was not caused by an unusual or extraordinary exertion, as required by the Utah Supreme Court's decision in *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986). Mr. Owen challenges the denial of benefits by arguing that a medical panel should have been appointed to determine whether his preexisting condition contributed to the injury.

FINDINGS OF FACT

The Appeals Board adopts Judge Marlowe's findings of fact, which are summarized as follows. Mr. Owen was involved in a motorcycle accident in 1998 when he injured his right shoulder and had a rotator cuff repair. These problems were mostly resolved with treatment until July 18, 2003, when Mr. Owen suffered a superior labral tear of his right shoulder. Mr. Owen was released to work without restrictions on May 19, 2006.

On July 8, 2006, Mr. Owen was working for NAPA when he lifted a box weighing

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approximately 13 pounds over his head. As he lifted the box, Mr. Owen heard a pop and felt a burning sensation in his right shoulder. Mr. Owen consulted with Dr. Fukushima, who diagnosed the injury as an aggravation from a popped scar band which resulted in a shoulder strain. Mr. Owen underwent an MRI on his right shoulder, which Dr. Fukushima later reviewed. After reviewing the MRI, Dr. Fukushima opined that Mr. Owen did not suffer a recurrent injury, but did not specifically address whether his previous shoulder problems contributed to his current injury.

On September 21, 2006, Dr. Weeks performed arthroscopic surgery to evaluate and repair Mr. Owen's right shoulder. After performing the surgery, Dr. Weeks diagnosed Mr. Owen with a torn superior labrum and that sutures and anchors from the previous surgery were loose, but offered no opinion about whether the injury caused the loose sutures and anchors.

Mr. Owen was later examined by NAPA's medical expert, Dr. Knorpp, who determined that Mr. Owen suffered a recurrent superior labral tear in his right shoulder. After reviewing Dr. Weeks's notes from the arthroscopic surgery, Dr. Knorpp concluded that Mr. Owen had a preexisting condition that contributed to his injury.

DISCUSSION AND CONCLUSIONS OF LAW

The Commission's Rule 602-2-2(A) identifies some circumstances in which medical panels must be appointed.

A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally, a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are...conflicting medical opinions related to causation of the injury....

Dr. Fukushima and Dr. Knorpp do not use the same language regarding a causal connection between Mr. Owen's preexisting shoulder problems and his current injury. However, Dr. Fukushima and Dr. Knorpp do have conflicting opinions about whether Mr. Owen's current injury is related to his preexisting condition.¹ The Appeals Board finds that the medical experts' testimony on the relationship between Mr. Owen's preexisting condition and his current injury was not sufficiently persuasive to resolve the issue of causation without the expert analysis of an impartial medical panel.

The Appeals Board therefore remands this matter to Judge Marlowe for appointment of such a panel and for other proceedings as Judge Marlowe deems appropriate. Because resolution of the cause of Mr. Owen's shoulder injury may have some bearing on whether his preexisting shoulder condition contributed to his current injury, the Appeals Board does not address that issue at this time.

¹ Dr. Fukushima opined that Mr. Owen's current injury was not a recurrence of a previous shoulder problem, but Dr. Knorpp concluded that Mr. Owen did suffer a recurring injury.

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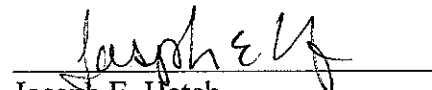
ORDER

The Appeals Board sets aside Judge Marlowe's decision and remands this matter to Judge Marlowe for further proceedings consistent with this finding. It is so Ordered..

Dated this 28th day of January, 2010.


Colleen S. Colton, Chair


Patricia S. Drawe


Joseph E. Hatch